STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASAN CHARLES BELLAMY a/k/a CHARLES LASAN BELLAMY,

Defendant-Appellant.

UNPUBLISHED
April 14, 1998

No. 195142
Macomb Circuit Court
LC No. 95-000695-FC

Before: Doctoroff, P.J. and Reilly and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), and was tried with three codefendants in a joint trial before a single jury. The jury found defendant guilty of one count of CSC I and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4). The trial court sentenced defendant as an adult to twelve to thirty years' imprisonment on his conviction of CSC I and five to fifteen years' imprisonment on his conviction of CSC III, with the sentences to run concurrently. Defendant appeals as of right. We affirm.

This case arises from the sexual assault of a fifteen-year-old girl by defendant, who was sixteen years old at the time of the assault, and by three of defendant's friends (codefendants Michael Franklin, Andrew Wright, and Adrian Manuel). At trial, the victim testified to the following facts: She met defendant briefly when she applied for a job at the Kentucky Fried Chicken restaurant where defendant was employed. On the following day, defendant telephoned the victim and they arranged to meet at a location near her house. After talking and driving around in defendant's car for awhile, the victim asked defendant to take her home because she was grounded and her parents were due back soon. Defendant told her that he first had to pick up his friends from school. He then drove to a nearby high school, picked up codefendants Wright and Manuel, and took them all back to codefendant Franklin's house. The victim explained that she went inside the house with the boys because she did not feel safe sitting alone in the car in Franklin's neighborhood.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Once inside, defendant asked the victim to go downstairs into the basement, because he and his friends had something to do upstairs. Thinking a "drug deal" was about to happen, the victim went downstairs to the basement. A few minutes later, defendant came down to the basement and sat next to the victim on a couch. They began talking and kissing. Shortly thereafter, the three codefendants joined them in the basement. Defendant and the victim continued kissing for another minute when defendant said "oh yes, now its on." The victim then turned around to see that the three codefendants had removed most of their clothing. She asked defendant to take her home and he said "no, you don't have to go home yet" and "you still have time." She did not try to leave on her own because she was scared and because the three codefendants made a wall in front of the stairs.

Wright pushed the victim's shoulders down to the couch while Manuel started to remove her pants. The victim tried to push Manuel's hands out of the way, but was not able to do so. With Wright holding her down, Manuel removed her pants and inserted his penis into her vagina. Wright and Manuel then switched positions and Wright engaged in vaginal intercourse with the victim while Manuel held her down. Manuel then engaged in anal sex with the victim while Wright made the victim perform fellatio on him. Wright and Manuel then laid her down on a mattress on the floor. The victim never gave any of the boys permission to have sex with her. She did not try to leave when the boys were holding her, because she did not think they would let her go. Later, when the boys laid her on the mattress, she did what she was told because she was afraid of them. Then she started to black out. She knew that all of the boys were taking turns having sex with her, but she could not remember many details. During this period of the assault, the boys were singing degrading songs about sex. The victim was crying the whole time. When Franklin was initially hesitant to have sex with the victim, defendant urged him to do so, saying "well, everybody got their turn, it's your turn now." At one point, defendant threw a belt to Franklin, who used it to hit the victim on her buttocks.

The victim testified that, during the assault, defendant had vaginal sex with her twice and made her perform fellatio on him once. She was not sure about the sequence of the various incidents of penetration, but remembered that he used a condom the first time. She also explained that nobody was holding her down when defendant had sex with her, but that all of the other boys were in the room. At one point she pleaded with defendant to take her home. Defendant said he would after "just one more time." Eventually, defendant told her to get dressed and drove her to an area near her house.[1]

On appeal, defendant first argues that the evidence was insufficient to support his conviction of CSC I. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

A person is guilty of CSC I if he (1) "engages in sexual penetration with another person," (2) is "aided or abetted by 1 or more persons," and (3) either "knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless," or "uses force or

coercion to accomplish the sexual penetration." MCL 750.520b(1)(d); MSA 28.788(2)(1)(d); *People v Hurst*, 132 Mich App 148, 151; 346 NW2d 601 (1984). Viewed in a light most favorable to the prosecution, the victim's testimony that defendant engaged in vaginal intercourse with her and forced her to perform fellatio on him was sufficient to establish the element of sexual penetration. See MCL 750.520a(*l*); MSA 28.788(1)(*l*). Further, the victim's testimony (1) that the presence of the three codefendant's prevented her from attempting to leave, and (2) that the boys encouraged each other by singing degrading songs about sex, was sufficient to establish that defendant was aided and abetted by other persons, because each of the actors assisted and encouraged the others in accomplishing the penetrations. Cf. *People v Rogers*, 142 Mich App 88, 92; 368 NW2d 900 (1985).

Force or coercion includes but is not limited to physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise. *People v Ben Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). The element of force or coercion may be found in the absence of actual violence or express threats where the victim submits to the undesired acts of the defendant under a reasonable fear of dangerous consequences. *People v McGill*, 131 Mich App 465, 474-475; 346 NW2d 572 (1984). Force or coercion may also be found where a defendant engages in sexual intercourse with a person whose physical helplessness and lack of consent is clear. *Ben Brown*, *supra* at 450. Here, when viewed in a light most favorable to the prosecution, the victim's testimony that defendant engaged in vaginal intercourse with her and made her perform fellatio on him, (1) despite her repeated requests to leave and the fact that she was crying the entire time, (2) while three other boys surrounded them in the basement of an unfamiliar house, (3) after two of the other boys had already physically held her down and forcibly raped her, was sufficient to establish defendant's use of force or coercion. Cf. *Ben Brown*, *supra* at 450; *McGill*, *supra* at 474-475.

Defendant next argues that he was denied his right to a unanimous jury verdict when the trial court failed to specifically instruct the jury that it had to unanimously agree on the occurrence or nonoccurrence of each particular act of penetration. We disagree. Because defendant expressed his satisfaction with the instructions as given and never requested any special unanimity instruction, we review this issue only to determine if manifest injustice resulted. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Maleski*, 220 Mich App 518, 521; 560 NW2d 71 (1996).

A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Mills*, 450 Mich 61, 80; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995). Under the Michigan Constitution, a criminal defendant is entitled to a unanimous jury verdict. Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). In order to protect this right, the trial court must instruct the jury regarding the unanimity requirement. *Cooks*, *supra* at 511. In some circumstances, a general unanimity instruction may not be adequate. If the prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. *Id.* at 530.

In this case, defendant was tried on three counts of CSC I, each count on a separate and particular alleged act of penetration. Before trial, the trial court read the information to the jury, which specified that counts one and two were based on allegations of "penis/vaginal" penetration and that count three was based on an allegation of "penis/oral" penetration. The prosecutor explained the alleged factual basis for each count in her opening statement and again in her closing argument. Finally, the trial court instructed the jury in general terms that its verdict had to be unanimous and that it could reach one of three possible verdicts (guilty of the charged crime, guilty of a less serious crime, or not guilty) as to each count. Because (1) the prosecution did not offer evidence of multiple acts by defendant that would have satisfied the actus reus element of any of the *single* charged offenses, and (2) there is no reason to believe that the jury was confused or disagreed about the factual basis of defendant's guilt as to any of the three separately-charged offenses, no manifest injustice resulted from the trial court's failure to give a more detailed unanimity instruction. *Cooks*, *supra* at 530.

Next, defendant contends that the trial court abused its discretion by denying his motion for severance. We disagree. This Court reviews a trial court's decision to join or sever defendants for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682, amended in part on reh'g 447 Mich 1203 (1994). Severance of a case is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana*, *supra* at 331.

Here, defendant argued before trial that his rights would be unfairly prejudiced in a joint trial by the introduction of certain statements made to police by codefendants Franklin and Wright. A defendant is denied his right to confrontation when a codefendant's statement expressly implicating the defendant is introduced in a joint trial. However, a defendant's right to confrontation is not denied when a codefendant's statement is introduced with a proper limiting instruction and the statement is redacted to eliminate the defendant's name and any reference to his existence. See *People v Banks*, 438 Mich 408, 417-418; 475 NW2d 769 (1991), quoting *Richardson v Marsh*, 481 US 200, 208-211; 107 S Ct 1702; 95 L Ed 2d 176 (1987), distinguishing *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). Where the defendant's name is not mentioned, but the fact of his existence is not totally eliminated from the redacted statement, a defendant is denied his right to confrontation if there exists a substantial risk that the jury will consider the statement in deciding the defendant's guilt. See *Banks*, *supra* at 419-421.

In this case, the trial court denied defendant's motion for severance after the prosecution agreed to redact all references to defendant from the codefendants' statements. Our review of the redacted taped interviews of codefendants' confessions, which were played to the jury at trial, shows (1) that defendant's name was never mentioned and (2) that nothing in either statement suggested that defendant was present in the basement during the sexual assault. Accordingly, defendant was not implicated by codefendants' statements. The trial court also specifically instructed the jury that the statements of the codefendants were only to be used against them respectively and could not be used against any other codefendant. Therefore, we conclude that the trial court did not abuse its discretion when it denied defendant's motion for severance. *Hana*, *supra* at 331; *Banks*, *supra* at 417-421.

Defendant also argues that he was denied a fair trial when the prosecutor argued facts outside of the record during her closing argument. We disagree. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Here, when the prosecutor purported to read a portion of codefendant Wright's confession during her closing argument, she attributed some words to Wright that were not a part of his confession introduced at trial. Because defendant did not object to her remarks at trial, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). In this instance, because the challenged remarks referred to Wright rather than to defendant, our failure to review this issue will not result in a miscarriage of justice.

Defendant next argues that the trial court erred in sentencing defendant as an adult. We disagree. This Court applies a bifurcated standard of review in reviewing a trial court's decision to sentence a minor as a juvenile or as an adult. *People v Cheeks*, 216 Mich App 470, 474; 549 NW2d 584 (1996). The trial court's findings of fact are reviewed under the clearly erroneous standard and its ultimate decision to sentence the minor as a juvenile or as an adult is reviewed for an abuse of discretion. *Id.* Findings of fact are clearly erroneous if, after review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Gregory Brown*, 205 Mich App 503, 505; 517 NW2d 806 (1994).

Pursuant to MCL 769.1(3); MSA 28.1072(3) and MCR 6.9131(A), the trial court must conduct a juvenile sentencing hearing to determine if the best interests of the defendant and the public would be served better by sentencing the juvenile as an adult. *Cheeks*, *supra* at 474. The trial court must consider six specific statutory factors in making this determination. See MCL 769.1(3); MSA 28.1072(3). The prosecutor has the burden of proving by a preponderance of the evidence that the best interests of the juvenile and the public would be served by sentencing the juvenile as an adult offender. *Cheeks*, *supra* at 475. Here, defendant contends that the trial court's decision was based on erroneous findings of fact. Although defendant disagrees with the trial court's conclusions as to each factor, he fails to explain why the trial court's *factual* findings were incorrect and cites little authority in support of his position. However, our review of the record reveals that the trial court's specific factual findings as to each factor were adequately supported and that its ultimate decision to sentence defendant as an adult rather than as a juvenile did not constitute an abuse of discretion.

Finally, defendant argues that the trial court erred in sentencing defendant to twelve to twenty years' imprisonment when the sentencing guidelines recommended a minimum sentence range of three to eight years. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. Where the guidelines' calculation differs from the trial court's intended sentence, the judge is alerted that the sentence falls outside a normative range and

should be evaluated to assure that it is not unfairly disparate, has a rational basis, and is not disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). The sentencing guidelines do not convey substantive rights, but are merely a tool to assist the trial court in its exercise of discretion. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). The trial court may exceed the guidelines when to do so would not violate the principle of proportionality. *Milbourn*, *supra* at 659-660. On some occasions, the offender's conduct will be so extraordinary in degree that it is beyond the anticipated range of behavior treated in the guidelines. *Id.* at 660 n 27; see also *People v Merriweather*, 447 Mich 799, 805-808; 527 NW2d 460 (1994). In this case, given the extreme circumstances of the offense, and considering defendant's dominant role in bringing the victim to the house and orchestrating her gang rape, we hold that the sentence imposed by the trial court did not constitute an abuse of discretion.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glen S. Allen, Jr.

[1] This Court reminds defendant's appellate counsel that a statement of facts in an appellant's brief "must be fairly stated without argument or bias." MCR 7.212(C)(6). Here, some portions of defendant's statement were inaccurately slanted in favor of defendant. For instance, defendant's statement of facts provides that "[the victim] never said she did not want to have sex [with the boys], and agreed to come back [to the house]." This statement is incomplete and misleading. Although the victim testified that she promised to come back to the house, she explained that she did so only to induce the boys to allow her to leave. Defendant's statement of facts further provides that "[the victim] testified she helped some of the defendants insert their penis [sic] in her vagina." Again, this statement is imprecise and somewhat misleading. At trial, the victim testified that she could not remember whether she helped the boys in such a way. However, she did remember testifying to that effect at the preliminary examination. Finally, in the argument section of his brief on appeal, defendant states as a factual matter that "[p]rior to engaging in sexual activity with [the codefendants], the complainant had been involved in consentual [sic] sexual activity with [defendant]." The record provides absolutely no basis for this statement. Although defendant may have been referring to the victim's testimony that she was kissing defendant while sitting on the couch, it is misleading under the facts presented here to describe kissing as "sexual activity."